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91-326

No. _____

Supreme Court, U.S.
FILED
AUG 5 - 1991
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THOMAS M. HAMRICK, RANDALL D. GROSZ, IAN L. FISCHER, BRANT G. FILIP and DOUGLAS L. CARTER,

Petitioners,

-vs-

ALLEN R. FRANKLIN, NATHAN L. GERATHS and RAFAEL MARTINEZ,

Respondents,

and

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX TO PETITION

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In the
United States Court of Appeals
For the Seventh Circuit

No. 89-1732

THOMAS M. HAMRICK, RANDALL D. GROSZ, IAN L. FISCHER, BRANT G. FILIP and DOUGLAS L. CARTER,

Plaintiffs-Appellants,

v.

ALLEN R. FRANKLIN, NATHAN L. GERATHS and RAFAEL MARTINEZ,

Defendants-Appellees,

and

UNITED STATES OF AMERICA,

Substituted Defendant-Appellee.

Appeal from the United States District Court for the Western District of Wisconsin.
No. 89 C 108—**John C. Shabaz,** *Judge.*

ARGUED FEBRUARY 14, 1990—DECIDED MAY 8, 1991

Before BAUER, *Chief Judge,* WOOD, JR., and KANNE, *Circuit Judges.*

KANNE, *Circuit Judge.* We have delayed deciding this appeal pending the outcome of a similar case heard by the United States Supreme Court. *United States v. Smith,*

59 U.S.L.W. 4201 (U.S. Mar. 20, 1991). After that decision, the ultimate disposition of this case should be made easier.

The plaintiffs and individual defendants in this action were employees of the William S. Middleton Memorial Veterans Hospital in Madison, Wisconsin. The plaintiffs filed a complaint against the defendants in the Circuit Court of Dane County, Wisconsin, alleging libel and interference with employment contract rights. The plaintiffs requested a cease and desist order, compensatory and punitive damages.

The defendants removed the case to federal district court. The government then moved to substitute itself as the sole defendant, and to dismiss the action. The government's motion to substitute was based on 28 U.S.C. § 2679. The government argued that the plaintiffs alleged a common law tort, and the Federal Tort Claims Act ("FTCA"), as amended by the Federal Employees Liability Reform and Tort Compensation Act of 1988 ("FELRTCA"), provides that a suit against the United States is the exclusive remedy for persons with common law tort claims arising from the actions of federal employees taken within the scope of their employment. The Attorney General's designee had made the required certification pursuant to 28 U.S.C. § 2679(d) that the actions of the defendants were within the scope of their employment. The government wanted the district court to follow the steps contained in § 2679. The motion to dismiss was premised on the plaintiffs' failure to comply with the jurisdictional prerequisite of filing an administrative tort claim against the Veterans Administration. This failure to file, the government argued, deprived the district court of subject matter jurisdiction.

The plaintiffs claimed that the defendants' actions were outside the scope of employment. They also argued that because the exceptions listed in 28 U.S.C. § 2680 are not covered under the FTCA, they may maintain a separate action against the individual defendants for one or more of those torts.

As urged by the government, the district court accepted the scope certification and ordered the United States substituted as the sole defendant pursuant to § 2679(d). The district court then dismissed the case without prejudice for lack of subject matter jurisdiction. The plaintiffs appeal, alleging that the 1988 amendment to the FTCA did not make the FTCA the exclusive remedy for intentional torts explicitly excepted from its coverage.

Before application of the provisions of the FTCA, we must determine whether the scope certification is subject to judicial review. One of the underlying requirements of the FTCA is that the employee be acting within the scope of employment, which is initially determined by the certification.

The government has pulled back from its original position espoused in the district court (and initially before us) that the scope certification is not subject to judicial review. It has dropped that earlier position in a number of other cases as well. *See, e.g., S.J. & W. Ranch, Inc. v. Lehtinen*, 913 F.2d 1538 (11th Cir. 1990), *amended*, 924 F.2d 1555 (11th Cir. 1991); *Melo v. Hafer*, 912 F.2d 628 (3d Cir. 1990), *cert. granted*, ____ U.S. ____, 111 S. Ct. 1070 (1991). While there appears to be a split in the circuits on this issue, we (and apparently the government) think the better answer lies with the circuits concluding that the scope determination is subject to judicial review. *See S.J. & W. Ranch*, 913 F.2d 1538; *Melo*, 912 F.2d 628; *Nasuti v. Scannell*, 906 F.2d 802 (1st Cir. 1990); *Arbour v. Jenkins*, 903 F.2d 416 (6th Cir. 1990); *see also Cooper v. Kribble*, 1991 U.S. Dist. LEXIS 88 (N.D. Ill. 1991); *Petrousky v. United States*, 728 F. Supp. 890 (N.D.N.Y. 1990). *But see Mitchell v. Carlson*, 896 F.2d 128 (5th Cir. 1990); *Aviles v. Lutz*, 887 F.2d 1046 (10th Cir. 1989).

We look first to the statutory language contained in the FTCA, as amended by the FELRTCA. 28 U.S.C. § 2679(d)(2) provides:

> Upon certification by the Attorney General that the defendant employee was acting within the scope of

> his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

Congress gave the certification conclusiveness with respect to one aspect of the proceedings. But we do not infer from this language that Congress meant to insulate the certification from all judicial review. The statute is not explicit with regard to this, and when read with regard to the certification provisions as a whole, the answer to the question of the propriety of judicial review is ambiguous. Therefore, we might do well to review some of the legislative history surrounding adoption of the FELRTCA.

As other courts have noted, the statements of Representative Frank, the sponsor of the FELRTCA, are helpful. He noted the plaintiff would have the right to contest the certification if the plaintiff thought the Attorney General was certifying without justification. *See Arbour*, 903 F.2d at 421 (citing *Legislation to Amend the Federal Tort Claims Act: Hearing Before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary*, 100th Cong., 2d Sess. 128 (Apr. 14, 1988) [hereinafter *Legislation*] (statements of Representative Frank)).

The understanding of the legislative sponsor was confirmed by testimony of an official from the Department of Justice. *Legislation*, *supra*, at 128. The Deputy Assistant Attorney General appearing at the hearing even went

on to state that at some point the certification would be reviewable by a court, "probably a Federal District Court." *Id.* at 133, *quoted in S.J. & W. Ranch*, 913 F.2d at 1541. Other courts have noted the potential separation of powers, *S.J. & W. Ranch*, 913 F.2d at 1541; *Nasuti*, 906 F.2d at 813, and due process, *Petrousky*, 728 F. Supp. at 892-95, concerns that would arise absent any type of judicial review of the scope certification. We agree with the government and the plaintiffs here that based on the statutory language and the legislative history, the scope certification is conclusive only with respect to removal, and the district court has the power to review the certification. Further, when a review of the scope certification is requested, as it was here, the district court should give *de novo* review to determine whether the certification was proper. In this review, the plaintiffs have the burden of showing that the defendants' conduct was not within the scope of employment. *See, e.g., S.J. & W. Ranch*, 913 F.2d at 1543.

Without prior guidance on this issue, the district court merely accepted the Attorney General's certification and did not provide judicial review. Now, based on our analysis today, we must remand for a determination as to whether the defendants were acting within the scope of employment. If the district court finds the defendants' actions were within the scope of employment, then the plaintiffs' action is governed by the Supreme Court's recent decision in *United States v. Smith*, 59 U.S.L.W. 4201 (U.S. Mar. 20, 1991). In that case, although one of the exceptions in 28 U.S.C. § 2680 barred recovery under the FTCA for the injury incurred, the plaintiff still could not proceed to seek damages against the particular governmental employee who caused the injury. The Court held that the FELRTCA bars this alternative method of recovery. *Id.* at 4202.

The plaintiffs claim libel and interference with contract rights. Unfortunately, the FTCA contains an exception for these and other similar types of claims in 28 U.S.C.

§ 2680(h). The government thus has a defense which prevents recovery under the FTCA. In addition, because the FELRTCA provides that the remedy under the FTCA is exclusive for employment-related torts, if the district court finds the defendants were acting within the scope of their employment, the plaintiffs will also be barred from bringing an action against the individual defendants.

For the foregoing reasons, the decision of the district court dismissing the action is VACATED and the case is REMANDED for further proceedings consistent herewith.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

CASE TITLE: THOMAS HAMRICK, ET AL.
VS.
UNITED STATES OF AMERICA

DOCKET NUMBER: 89-C-108-S

JUDGE: John C. Shabaz

Decision by Court. This action has come on for consideration by the court with the judge (magistrate) named above presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That judgment is entered in favor of the defendant, United States of America, and against the plaintiffs, dismissing the complaint of the plaintiffs without prejudice.

/s/Joseph W. Skupnewitz
Clerk
Date 3/23/89

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

THOMAS M. HAMRICK, RANDALL D. GROSZ, IAN L. FISCHER, BRANT G. FILIP, and DOUGLAS L. CARTER,
Plaintiffs,

v.

ALLEN R. FRANKLIN, NATHAN L. GERATHS and RAFAEL MARTINEZ,
Defendants.

ORDER
89-C-108-S

The defendants have moved to substitute the United States of America as sole defendant in the above entitled matter and to dismiss.

It is undisputed that plaintiffs have commenced an action alleging that the individually named defendants libeled them and acted with an improper motive outside the lawful scope of their employment.

The defendants argue that pursuant to 28 U.S.C. §2679, as recently amended by the Federal Employee Liability Reform and Tort Compensation Act of 1988 (Public Law 100-694), the Federal Tort Claims Act is the exclusive remedy for any job-related common law torts of federal employees. Defendants argue that where the Attorney General has certified, as here, that the individual defendants were acting within the scope of their employment as employees of the United States at the time

of such [2] incident, the United States should be substituted as the sole defendant.

The plaintiffs argue that pursuant to 28 U.S.C. §2680(h), any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contract rights is excluded from the Act and 28 U.S.C. §1346(b), which provides this Court exclusive civil jurisdiction of civil actions on claims against the United States for monetary relief for injury, loss of property or personal injury or death caused by negligent or wrongful act or omission of any government employees while acting within the scope of their employment.

This Court is of the opinion that §2679(d), as amended, defeats the plaintiffs' argument. According to its provisions, an action against the United States under the Federal Tort Claims Act for any job-related common law tort of its employees becomes an exclusive remedy. The availability of suit under the Act precludes any other civil act or proceeding of any kind from being brought against an individual federal employee or his or her estate if such action or proceeding would sound in common law tort. It is true that where an employee is accused of egregious misconduct rather than neglect or poor judgment, then the United States may not be substituted as the defendant and the United States may not be liable. The test for whether an act was committeed within an employee's scope of employment is generally [3] whether the employee's acts are an incident or a part of or in furtherance of the employee's

employment. The amended section removes potential personal liability of federal employees for common law torts committed within the scope of their employment, providing instead an exclusive remedy in an action against the United States. Here the Attorney General has certified that the defendant employees were acting within the scope of their employment at the time of the incident out of which this lawsuit arose. Once this certification is made, any civil action or proceeding commenced upon such claim in a United States District Court shall be deemed an action against the United States. Once that certification is accomplished, the action shall proceed in the same manner as any action against the United States which has been filed pursuant to §1346(b).

The plaintiffs argue that the United States has not waived its sovereign immunity and/or consented to be sued and to stand liable for the torts committed by individuals who commit such torts as libel and improperly motivated intentional interferences with other persons' employment rights. The Court certainly understands the concerns which plaintiffs have suggested, but is also of the opinion that upon that certification signed by the United States Attorney dated February 7, 1989, the individual defendants Allen R. Franklin, Nathan L. Geraths and Rafael Martinez were acting within the scope of their employment as employees of the United States at the time of the alleged [4] incident. The United States has certified that in spite of the plaintiffs' understanding that the individual employees were engaged in egregious conduct rather than mere negligence or poor judgment, nonetheless they were so acting, and an action

pursuant to the Federal Tort Claims Act is the exclusive remedy upon the facts alleged in plaintiffs' complaint.

The Court accepts the government's certification and, accordingly, will substitute the United States of America as the sole defendant in this action.

The remaining concern, subject matter jurisdiction, can be readily resolved by reference to 28 U.S.C. §§2401(b) and 2675. A tort claim against the United States cannot be commenced unless it is first presented in writing to the appropriate federal agency. It is undisputed that no such claim has been presented to the Veterans Administration. Consequently, this Court lacks subject matter jurisdiction at this time upon the facts alleged in plaintiffs' complaint, an appropriate claim not having been filed.

Accordingly, ORDER

IT IS ORDERED that defendants' motion to substitute the United States of America as sole defendant is GRANTED.

IT IS FURTHER ORDERED that defendants' motion to dismiss for lack of subject matter jurisdiction is GRANTED, without prejudice.

Entered this 22nd day of March, 1989.

BY THE COURT:
/s/ JOHN C. SHABAZ
District Judge

STATE OF WISCONSIN CIRCUIT COURT
DANE COUNTY

THOMAS M. HAMRICK, RANDALL D. GROSZ,
IAN L. FISCHER, BRANT G. FILIP
and DOUGLAS L. CARTER,

Plaintiffs,

v. Case No. 89 CV 0199

ALLEN R. FRANKLIN, NATHAN L. GERATHS
and RAFAEL MARTINEZ,

Defendants.

SUMMONS

THE STATE OF WISCONSIN TO SAID DEFENDANTS:

You are hereby notified that the Plaintiffs named above have filed a lawsuit or other legal action against you. The Complaint, with is attached, states the nature and basis of the legal action.

Within twenty (20) days of receiving this Summons you must respond with a written Answer, as that term is used in Chapter 802 of the Wisconsin Statutes, to the

Complaint. The Court may reject or disregard an Answer that does not follow the requirements of the Statutes. The Answer must be sent or delivered to the Court, whose address is Clerk of Courts, Circuit Court, Dane County, 210 Martin Luther King, Jr. Boulevard, Madison, Wisconsin 53709, and to LAWTON & CATES, S.C., the Plaintiffs' attorneys, whose address is 214 West Mifflin Street, Madison, Wisconsin 53703. You may have an attorney help or represent you.

If you do not provide a proper Answer within twenty (20) days the Court may grant Judgment against you for the award of [2] money or other legal action requested in the Complaint, and you may lose your right to object to anything that is or may be incorrect in the Complaint. A Judgment may be enforced as provided by law. A Judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

LAWTON & CATES, S.C.

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STATE OF WISCONSIN CIRCUIT COURT
DANE COUNTY

THOMAS M. HAMRICK, RANDALL D. GROSZ, IAN L. FISCHER, BRANT G. FILIP and DOUGLAS L. CARTER,
Plaintiffs,

v. Case No. 89 CV 0199

ALLEN R. FRANKLIN, NATHAN L. GERATHS and RAFAEL MARTINEZ,
Defendants.

COMPLAINT

COME NOW The Plaintiffs named above, Thomas M. Hamrick, Randall D. Grosz, Ian L. Fischer, Brant G. Filip and Douglas L. Carter, by their attorneys, LAWTON & CATES, S.C., Bruce M. Davey and Bruce F. Ehlke, and as and for their causes of action against the named Defendants, Allen R. Franklin, Nathan L. Geraths and Rafael Martinez, allege and show to the Court as follows:

1. Each of the Plaintiffs, Thomas M. Hamrick, Randall D. Grosz, Ian L. Fischer, Brant G. Filip and Douglas L. Carter, is an adult resident of Wisconsin. Hamrick resides at N4671 St. Lawrence Bluff Road, Poynette, WI 53955; Grosz resides at 3926 Rockwell Drive,

Madison, Wisconsin 53714; Fischer resides at 1818 Boyd Avenue, Madison, Wisconsin 53704; Filip resides at W10892 HWY V, Lodi, WI 53555 and Carter resides at 126 N. Pardee Street, Box 724, Marshall, WI 53559.

2. Each of the Defendants, Allen R. Franklin, Nathan L. Geraths and Rafael Martinez, is an adult resident of Dane County, Wisconsin. Franklin resides at Bldg. No. 4, William S. Middleton Memorial Veterans' Hospital, 2500 Overlook Terrace, Madison, WI [2] 53705; Geraths resides at 4893 Foxfire Trail, Middleton, WI 53562 and Martinez resides at 7318 Branford Lane West, Madison, WI 53717.

3. At times material to this action, Hamrick, Grosz, Fischer, Filip and Carter, and each of them, has been employed at the William S. Middleton Memorial Veterans' Hospital located at 2500 Overlook Terrace in the City of Madison, Dane County, Wisconsin, and Grosz, Fischer, Filip and Carter continue to be so employed to date. At the same time, Franklin, Geraths and Martinez, and each of them, has been employed at the same Hospital, and each of them continues to be so employed to date.

4. On October 21, 1988 Geraths caused letters to be issued in which he stated that Carter, Filip and Fischer were guilty of criminal conduct--"participating in a sick-out", which was subject to a fine and imprisonment, which statement was derogatory in nature, untrue when made and had an adverse affect on their good names, reputations, standing in the community and employment security.

5. Geraths made said statement knowing that it was false or in reckless disregard of its truth or falseness. Notwithstanding their written request that he retract said statement, to date Geraths has refused and failed to issue the requested retraction.

6. Carter, Filip, Fischer, Grosz and Hamrick are informed and believe that Geraths has issued, or caused to be issued, other letters or written memoranda which also have contained defamatory statements that have been untrue and that have libeled [3] their good names and reputations and adversely affected their standing in the community and employment security. To date, notwithstanding their request for copies of letters or written memoranda that have been issued concerning them, Carter, Filip, Fischer, Grosz and Hamrick have not been furnished the requested copies.

7. At times material to this action, and to date, Franklin, Geraths and Martinez have issued or caused to be issued letters and written memoranda that have contained statements derogatory of Carter, Filip, Fischer, Grosz and Hamrick, and they repeatedly have changed the shift assignments of Carter, Filip, Fischer, Grosz and Hamrick, denied them the lawful use of their accrued sick leave when they were ill or disabled, threatened them with disciplinary action for contrived reasons and reasons without a basis in fact, and otherwise pursued a course of conduct designed to deny promotional and other employment opportunities to Carter, Filip, Fischer, Grosz and Hamrick, and to disrupt and interfere with, and to cause the termination of, their

employment at the Williams S. Middleton Memorial Veterans' Hospital in Madison, Wisconsin.

8. The conduct referred to at Paragraphs 4, 5, 6 and 7 of this Complaint has been engaged in by Franklin, Geraths and Martinez, acting individually and in concert with each other, pursuant to a conspiracy, the unlawful object of which was, and continues to be, an intentional interference with, and the termination of, the employment of Carter, Filip, Fischer, Grosz [4] and Hamrick at the William S. Middleton Memorial Veterans' Hospital in Madison, Wisconsin.

9. The conduct referred to at Paragraph 4, 5, 6, 7 and 8 of this Complaint has been engaged in by Franklin, Geraths and Martinez, acting intentionally and knowingly, in bad faith, with an improper motive and for personal reasons unrelated to the lawful duties and responsibilities of their employment at the William S. Middleton Memorial Veterans' Hospital in Madison, Wisconsin, and said conduct has been, and is, without and in excess of the lawful duties and responsibilities of their employment and outside the lawful scope of their employment at that Hospital. Said conduct has been, and continues to be, extreme and outrageous.

10. As a result of the conduct of Franklin, Geraths and Martinez referred to at Paragraphs 4, 5, 6, 7 and 8 of this Complaint, the employment of Hamrick at the William S. Middleton Memorial Veterans' Hospital has been terminated, the employment of Carter, Filip, Fischer and

Grosz has been interfered with and disrupted, and Carter, Filip, Fischer, Grosz and Hamrick have been caused to suffer emotional distress, injury to reputation and economic injury and monetary loss.

11. As a result of the conduct of Franklin, Geraths and Martinez, their fellow employees at the William S. Middleton Memorial Veterans' Hospital, Carter, Fiip [sic], Fischer, Grosz and Hamrick, have suffered ordinary damages, in an amount to be determined by a jury of their peers.

[5] 12. Because of the willful and malicious conduct of Franklin, Geraths and Martinez, an award of punitive damages against each of them is appropriate, in an amount to be determined by the jury.

WHEREFORE, IT IS PRAYED That Judgment be entered for Douglas L. Carter, Brant G. Filip, Ian L. Fischer, Randall D. Grosz and Thomas M. Hamrick, and against Allen R. Franklin, Nathan L. Geraths and Rafael Martinez,

1. Ordering the Defendants, and each of them, to cease and desist from their unlawful conduct against the Defendants;

2. Directing that Hamrick be reinstated in his employment at the William S. Middleton Memorial Veterans' Hospital, with all wages and benefits restored;

3. Awarding ordinary damages to the Plaintiffs, in an amount to be determined by the jury, against the Defendants, and each of them, jointly and severally;

4. Awarding punitive damages to the Plaintiffs, in an amount to be determined by the jury, against the Defendants, and each of them, jointly and severally;

5. Awarding the Plaintiffs their costs, disbursements and attorneys fees relating to this action; and

6. Granting such other and further relief as may be appropriate.

[6] Dated: January 12, 1989.

LAWTON & CATES, S.C.

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100TH CONGRESS} 2ND SESSION
HOUSE OF REPRESENTATIVES} REPORT 100-700

FEDERAL EMPLOYEES LIABILITY REFORM AND TORT COMPENSATION ACT OF 1988

JUNE 14, 1988--Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

MR. FRANK, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H.R. 4612]

. . . .

[2] PURPOSE OF H.R. 4612

H.R. 4612 would provide immunity for Federal employees from personal liability for common law torts committed within the scope of their employment. A person injured by the actions of a Federal employee would be able to seek damages for such injuries from the United States under the Federal Tort Claims Act.

SUMMARY OF H.R. 4612

H.R. 4612 would amend the Federal Tort Claims Act to address the potential liability of Federal employees which results from the *Westfall* decision. The essential elements

of this bill include: the substitution of the United States as the defendant in any action against a Federal employee who was acting within the scope of employment; the preservation for the United States of any defenses which could be raised because the employee had either legislative or judicial immunity; and the establishment of this remedy against the United States under the Federal Tort Claims Act as the exclusive remedy for the claimant, thus precluding any other action or civil suit against the Federal employee or his estate based upon the same conduct.

BACKGROUND

On January 13, 1988, the United States Supreme Court issued a decision in *Westfall v. Erwin*, 56 U.S.L.W. 4087, which dramatically changed the law which governs the personal tort liability of Federal employees.

Until the *Westfall* decision, the general rule applicable to Federal employees was that they were absolutely immune from personal liability in State common law tort actions for harm that resulted from activities within the scope of their employment. This immunity was based on court decisions which concluded that such immunity was essential if Federal employees were to be willing to carry out the duties of their office. The legal basis for this immunity was the doctrine of sovereign immunity. *Barr v. Matteo*, 360 U.S. 564. As a result of this immunity, the Federal Tort Claims Act (FTCA), which provides for actions for damages for torts against the United States, had

essentially been the exclusive remedy for those allegedly injured by governmental negligence.

However, in *Westfall*, the Supreme Court added an additional requirement for immunity when a Federal employee is sued in his personal capacity. Now, the Federal employee not only must have been acting within the scope of employment (the original standard), but also must have exercised governmental discretion in acting.

Until the *Westfall* decision, nearly all actions against Federal employees in their personal capacity were unsuccessful because those employees were acting in the course and scope of employment, and therefore were immune from personal liability. After *Westfall*, employees may be held personally liable if they were not exercising governmental discretion, even if they were acting in the scope of employment. Moreover, before *Westfall* most actions brought against Federal employees in their personal capacity were resolved through a summary judgment or dismissal early in the [3] case. This early resolution of the case was possible because the employee could be shown to have been acting within the scope of employment, and therefore absolute immunity precluded recovery. Under *Westfall*, summary judgments and dismissals will no longer be readily available because the additional determination as to whether the employee exercised governmental "discretion" will always be a fact-based determination. Thus, the transaction costs (i.e. litigation costs) and length of time needed to resolve the issue of discretion in these

cases will be substantially increased, as will the uncertainty for the individual employee who is sued.

The additional requirement that the Federal employee have exercised discretion in carrying out his or her duty will have its most severe impact on lower-level employees; that is, the "rank and file" workers who are least likely to exercise discretion in carrying out their duties. Examples of the kind of claims that might be brought against these employees include: suits for clerical negligence in typing or filing documents that contributed to delays or errors in benefit determinations; suits against park rangers for injuries suffered at sites supervised or operated by the National Park Service; and suits against maintenance personnel for misplaced electrical cords or improperly mopped floors that may have caused injuries.

The potential increase in liability that results from the *Westfall* decision affects officers and employees of all three branches of government. The possible exposure of Federal employees to personal liability could lead to a substantial diminution in the vigor of Federal law enforcement and implementation. As the Department of Justice stated in testimony before the Subcommittee on Administrative Law and Governmental Relations:

> "The Court's decision [in *Westfall*] may be expected to undermine materially the ability of many Federal agencies to perform their programmatic responsibilities adequately. The prospect of routinely compelling Federal

> employees to subject their personal resources to the lottery of a jury trial will leave them uncertain and intimidated in the performance of any official duties that might expose them to potentially ruinous personal liability. And the list of official actions--especially routine administration of agency programs--that could result in liability under *Westfall* is almost limitless. It is hard to overestimate the impact that this prospect could have upon the morale of the Federal work force, especially rank-and-file workers." Statement of Deputy Assistant Attorney General Robert L. Wilmore, April 14, 1988, p. 5-6.

In issuing its decision in *Westfall*, the Supreme Court explicitly stated:

> "* * * Congress is in the best position to provide guidance for the complex and often highly empirical inquiry into whether absolute immunity is warranted in a particular context. Legislated standards governing the immunity of Federal employees involved in state-law tort action would be useful." *Westfall*, p. 8.

[4] H.R. 4612 responds to the *Westfall* decision by establishing legislated standards to govern the immunity of Federal employees who have allegedly committed state common law torts.

DISCUSSION

H.R. 4612 would remove the potential personal liability of Federal employees for common law torts committed within the scope of their employment, and would instead provide that the exclusive remedy for such torts is through an action against the United States under the Federal Tort Claims Act (FTCA). The functional effect of H.R. 4612 is to return Federal employees to the status they held prior to the *Westfall* decision. That is, Federal employees will be immune for personal liability for actions taken in the course and scope of their employment. Individuals allegedly harmed by the actions of Federal employees will be able to sue the United States for damages suffered as a result of these actions, but the suit will be exclusively against the United States under the FTCA, rather than against the Federal employee personally.

There is substantial precedent for providing an exclusive remedy against the United States for the actions of Federal employees. Such an exclusive remedy has already been enacted to cover the activities of certain Federal employees, including:

1. Drivers.--The FTCA (28 U.S.C. 1346(b), 2671-2680) is the exclusive remedy for injuries resulting from the negligent operation of a motor vehicle by a Federal employee acting within the scope of his employment.

2. Medical Personnel.--The FTCA is the exclusive remedy for medical or dental malpractice on the part of the medical personnel of most Federal agencies. (See, e.g., 10 U.S.C. 1089 regarding Department of Defense medical personnel; 22 U.S.C. 2458a regarding NASA medical personnel; 38 U.S.C. 4116 regarding Veterans Administration medical personnel; 22 U.S.C. 2702 regarding State Department physicians; and 42 U.S.C. 233 regarding Public Health Service physicians).

3. Military and Civilian Lawyers of the Department of Defense.--The FTCA is the exclusive remedy for a claim arising out of legal assistance provided by legal staff within the Department of Defense. (10 U.S.C. 1054)

From the perspective of a person injured by the official conduct of a Federal employee, the ability to sue the United States under the FTCA generally has distinct advantages over a suit against the individual Federal employee. The FTCA has an established administrative claims procedure through which many claims can be expeditiously resolved without costly litigation. And, perhaps most important the United States Government will be able to pay any judgment that is awarded, while an individual Federal employee may be "judgment-proof". Therefore, H.R. 4612 not only protects Federal employees, but also will help many of those who may be injured by these employees.

The provisions of H.R. 4612 are designed to carefully establish those circumstances in which the FTCA will constitute the exclusive remedy for the common law torts of Federal employees.

[5] Section 3 of H.R. 4612 explicitly extends the coverage of the FTCA to officers and employees of the legislative and judicial branches. The FTCA currently covers employees of the Executive Branch only.

Section 4 specifically preserves the traditional immunities that have long protected the key functions of the legislative and judicial branches of the government. The United States may assert the judicial or legislative immunity of judicial and congressional employees in so far as it is recognized in the law. However, the specific designation of these immunities does not imply that traditional common law defenses are not available. The United States is liable under the Federal Tort Claims Act. * * * "under circumstances where the United States, if a private person, would be liable * * *" 28 U.S.C. 1346(b). Thus, ordinary tort defenses, such as contributory negligence, assumption of risk, estoppel, waiver, and res judicata, as applicable, continue to be available to the United States. The United States would also be able to continue to assert other functional immunities, such as Presidential and prosecutorial immunity, recognized in the constitution and judicial decisions.

Section 5 amends Section 2679(d) of Title 28 in two respects. First, an action against the United States under

the FTCA for the common law torts of its employees becomes an exclusive remedy. That is, the availability of suit under the FTCA precludes any other civil action or proceeding of any kind from being brought against an individual Federal employee or his estate if such action or proceeding would sound in common law tort. The legislative objective is to protect Federal employees from liability by rendering the Federal government solely liable.

However, H.R. 4612 provides that the United States will incur vicarious liability only for the common law torts of its employees which are committed within the "scope of their employment." If an employee is accused of egregious misconduct, rather than mere negligence or poor judgment, then the United States may not be substituted as the defendant, and the individual employee remains liable. "[T]he test for [whether an act was committed within an employee's scope of employment] is generally whether the employee's act[s] are an incident or, a part of, or in furtherance of, the employee's employment." *Kemerer v. United States*, 330 F. Supp. 731, 733 (W.D. Pa. 1971), *aff'd*, 474 F.2d 1338 (3d Cir. 1973).

For example, under H.R. 4612, a civil suit for damages predicated upon a government maintenance worker's negligent failure to place a caution sign on a wet floor would be exclusively actionable under the FTCA. The employee's failure to properly place the sign on the floor occurred within the scope of his duties, and under H.R. 4612 an injured person would be precluded from bringing suit personally against the Federal employee in his

individual capacity. The injured person would instead be able to sue the United States under the FTCA.

Under the FTCA, the issue of whether an employee was acting within the scope of his employment is governed by the law of the state in which the negligent or wrongful conduct occurred. *Williams v. United States*, 350 U.S. 857, 76 S. Ct. 100, 100 L. Ed. 761 (1955). The courts have, throughout the years, utilized several discrete principles in examining the scope of employment issue. In [6] Handling Federal Tort Claims, Lester Jayson cites ten separate factors which may be relevant in determining whether an act was within an employee's scope of employment. Among the factors cited are: whether or not the act is one commonly done by such employee; the time, place, and purpose of the act; whether or not the act is outside the enterprise of the employer, or if within the enterprise, whether or not it has been entrusted to any employee; whether or not the employer has reason to expect that such an act will be done; the similarity in quality of the act done to the act authorized; whether or not the instrumentality by which the harm was done was furnished by the employer to the employee; the extent of departure from the normal method of accomplishing an authorized result; and whether or not the act is seriously criminal. [citations omitted] Jayson, 2 Handling Federal Tort Claims, §216.01, p. 9-155-56 (1986).

The second major feature of section 5 is that the exclusive remedy expressly does not extend to so-called constitutional torts. See *Bivens v. Six Unknown Agents of the*

Federal Bureau of Narcotics, 403 U.S. 388 (1971). Courts have drawn a sharp distinction between common law torts and constitutional or *Bivens* torts. Common law torts are the routine acts or omissions which occur daily in the course of business and which have been redressed in an evolving manner by courts for, at least, the last 800 years. The maintenance worker case discussed above is an example of a common law tort. As used in H.R. 4612, the term "common law tort" embraces not only those state law causes of action predicated on the "common" or case law of the various states, but also encompasses traditional tort causes of action codified in state statutes that permit recovery for acts of negligence. A good example of such codification of tort causes of action are state wrongful death actions which are predominantly found upon state wrongful death statutes. It is well established that the FTCA applies to such codified torts. See, e.g., *Richards v. United States*, 369 U.S. 1, 6-7 (1962); *Proud v. United States*, 723 F.2d 705, 706-07 (9th Cir. 1984), *cert. denied*, 467 U.S. 1252 (1984) applicability of recreational use statute). A constitutional tort action, on the other hand, is a vehicle by which an individual may redress an alleged violation of one or more fundamental rights embraced in the Constitution. Since the Supreme Court's decision in *Bivens*, *supra*, the courts have identified this type of tort as a more serious intrusion of the rights of an individual that merits special attention. Consequently, H.R. 4612 would not affect the ability of victims of constitutional torts to seek personal redress from Federal employees who allegedly violate their Constitutional rights.

The "exclusive remedy" provision of section 5 is intended to substitute the United States as the solely permissible defendant in all common law tort actions against Federal employees who acted in the scope of employment. Therefore, suits against Federal employees are precluded even where the United States has a defense which prevents an actual recovery. Thus, any claim against the government that is precluded by the exceptions set forth in Section 2680 of Title 28, U.S.C. also is precluded against an employee in his or her estate. See *Edelman v. Federal Housing Administration*, 382 F.2d 594 (2d Cir. 1967); *Safeway Portland E.F.C.U. v. Federal Deposit [7] Insurance Corporation*, 506 F.2d 1213 (9th Cir. 1974); *Vantrease v. United States*, 400 F.2d 853 (6th Cir. 1968); *Powers v. Schultz*, 821 F.2d 295 (5th Cir. 1987).

The Committee adopted technical amendments to Section 5 to remove any ambiguity as to the effect of the bill. These technical amendments clarify that H.R. 4612 addresses the situation in which a person who is injured by the tortious acts of a Federal employee acting in the scope of employment is seeking money damages for injuries resulting from those tortious acts. The purpose of H.R. 4612 is to provide that such actions for money damages proceed against the United States under the FTCA. The technical amendment to amend section 2679(b)(1) of title 28 makes it clear that an injured person retains the right to seek injunctive or other appropriate equitable relief against either the United States or the Federal employee. The technical amendment to amend section 2679(b)(2) of title 28 makes it clear that the changes made by this Act do not

alter either express or implied statutory rights of action for injunctive relief or damages under the usual rules of construction applied by the Supreme Court in such cases as: *Cort v. Ash*, 422 U.S. 66 (1975); *Piper v. Chris-Craft Industries*, 430 U.S. 1 (1977); and *Transamerica Mortgage Advisors Inc. v. Lewis*, 444 U.S. 11 (1979). Clearly, H.R. 4612 does not change the law, as interpreted by the courts, with respect to the availability of other recognized causes of action; nor does it either expand or diminish rights established under other Federal statutes.

Under Section 8, H.R. 4612 explicitly governs all claims which "accrue" after the date of enactment.[1] The provisions of H.R. 4612 also will apply, however, to all claims which have not been reduced to final judgment on the date of enactment, regardless of when they accrued. However, section 8 also contains provisions to ensure that no one is unfairly affected by the procedural ramifications of this provision. For example, if an injury has occurred before H.R. 4612 is enacted, but no lawsuit has yet been filed relative to that claim, the claimant will have to pursue a remedy against the United States, not against the employee. If a lawsuit has been filed, but it has not proceeded to final judgment, the United States will be substituted for the employee (or, if the lawsuit has been

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[1]Although when a claim "accrues" is subject to some legal interpretation, in the usual case it would be the date of the injury for which compensation is sought.

filed against both the United States and the employees, the employee will be dismissed from the suit), and resolution will occur accordingly.

Under H.R. 4612, no one who previously had the right to initiate a lawsuit will lose that right. Similarly, no one who has already initiated a suit will lose their claims solely because the procedural prerequisites associated with the FTCA are being made applicable. Persons who have a claim, but have not initiated a lawsuit, will still be allowed to submit an administrative claim against the United States for up to two years after the date of enactment, or within the time remaining under what otherwise would be the applicable state statute of limitations.[2]

[8] Persons who have initiated a lawsuit but never submitted an administrative claim to the Government[3] will

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[2]For example, if the claimant was injured six months before the date H.R. 4612 was enacted, and the state statute of limitations was three years, the claimant would have two years from the date of the enactment within which to file an administrative claim against the United States. If, in the same state, the claimant was injured two and one-half years before the date of enactment, the claimant would still have six months within which to file such a claim, despite the FTCA's two year statute of limitations. See sec. 8, p. 8 (1.7-16).

[3]A jurisdictional requirement under the FTCA.

not lose their right to pursue a lawsuit for having failed to submit such a claim. Instead, as long as their suit was timely under state law when it was filed, they will have at least 60 more days to file a timely administrative claim. See sec. 6, p. 7 (1.1-9).

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